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No. 95-1017

In The

Supreme Court of the United States

October Term, 1995

GENERAL SIGNAL CORPORATION,

Petitioner,

vs.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

Petition For Writ Of Certiorari
To the United States Court of Appeals
For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Contrary to MCI's claims, this case does not concern management or mismanagement by counsel of time allotments during federal trials. This case concerns fundamental rights of due process that will be denied to litigants within the Ninth Circuit unless this Court reviews the case of *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500 (9th Cir. 1995). Significantly, MCI seems unconcerned with the due process rights of litigants; due process is given short shrift in MCI's opposition. MCI largely ignores the portion of General Signal's petition for *certiorari* that argues that rigid time limits for trials violate due process.

MCI's claim that General Signal seeks a review of *dicta* from the Ninth Circuit opinion is likewise unfounded. The Ninth Circuit held that a Rule 403 analysis prior to excluding evidence is not necessary in certain circumstances. General Signal Petition Appendix at 18-19. This is in direct conflict with the First Circuit case of *Secretary of Labor v. DeSisto*, 929 F.2d 789, 795 (1st Cir. 1991), which held that a Rule 403 analysis must be performed. The cases from the Seventh and Eighth Circuits are in accord with *DeSisto*. *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990); *First National Bank and Trust Co. v. Hollingsworth*, 931 F.2d 1295 (8th Cir. 1991).

In view of the Ninth Circuit's ruling on the lack of necessity of a Rule 403 analysis, the Ninth Circuit's statement that General Signal was not prejudiced is meaningless. Without a Rule 403 analysis by the district judge to review, the Ninth Circuit could not know whether General Signal was prejudiced. This is why Rule 403 analyses

are integral to due process. Indeed, because the district court judge did not permit offers of proof, it was impossible for him, let alone the Ninth Circuit, to perform a Rule 403 analysis.

The issue of time limits during trials is not the routine matter MCI implies it to be in its opposition. Trials across the country in federal court should be administered according to the same standards that comport with due process. This Court's intervention is necessary in order to clarify a conflict in the circuits regarding time limits, as well as a conflict in the circuits regarding whether a Rule 403 analysis must be conducted prior to excluding evidence.

II. ARGUMENT

MCI attempts to divert this Court's attention from the issues at hand by claiming that this case concerns only the manner in which counsel for General Signal handled the time allotments.[1] The issue is not whether counsel for General Signal handled the case properly, but whether the *district court* overstepped its authority by imposing arbitrary, rigid time limits that bore no relation to the evidence, and whether the district court erred in

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[1] In so arguing, MCI makes several misstatements of fact, including that "the parties had ample and specific notice of trial time allocations." MCI Opp. at 2. In fact, MCI challenged the time limits several times and frequently squabbled about the time remaining to both parties, down to the 1/1000th of an hour. Excerpts of Record filed in Ninth Circuit ("E.R.") 16, pp. 208-22; E.R. 17, pp. 223-30.

failing to perform a Rule 403 analysis and excluded evidence solely for the sake of preventing delay.

A. MCI ignores General Signal's due process claim.

MCI claims in its opposition that it need not discuss General Signal's due process arguments since they are "dispense[d] with" because the "time problems were of [General Signal's] own making." MCI Opposition to Petition ("MCI Opp.") at 3. MCI completely ignores General Signal's assertion that between four and twelve minutes of cross-examination for key defense witnesses violates due process as a matter of law. The district court's limitation of General Signal's cross-examination bore no relationship to the testimony or importance of MCI's witnesses; the district court simply cut off General Signal's cross-examination completely arbitrarily. *See* E.R. 37, pp. 703, 800 (2273:2-23, 2575:8-25).

This fact alone demonstrates the pressing need for review. Based on the *General Signal* case, the law in the Ninth Circuit currently is that a district judge may limit cross-examination to as little as four minutes solely based on the judge's subjective opinion that the case should be moved along. This does not comport with due process, and should be corrected so that other lower courts do not make a similar mistake.

B. General Signal seeks substantive review of the Ninth Circuit's opinion that conflicts with opinions from other circuits, not a review of *dicta*.

It is clear from the Ninth Circuit's decision in *General Signal* that a different standard applies to trial judges in the Ninth Circuit than in the First, Seventh or Eighth Circuits. The effect of the Ninth Circuit's decision in *General Signal* is that trial judges do not need to perform a Rule 403 balancing analysis. In fact, trial judges may exclude evidence solely on the basis of delay, as was the case here. The Ninth Circuit acknowledges that the district court's denial of General Signal's motion to put on a rebuttal case "only cited the issue of delay." General Signal Petition Appendix at 18. In *General Signal*, the district court excluded evidence only to prevent delay, and the Ninth Circuit affirmed that decision.

MCI claims that the Ninth Circuit did not reach the Rule 403 issue, and found only that General Signal was not prejudiced by the denial of a rebuttal case. Contrary to MCI's claim, the Ninth Circuit recognized that "Under Rule 403, the court should consider the probative value of proffered evidence and balance it against the harm of delay." *Id.* (citing *DeSisto*, 929 F.2d at 789).

The *General Signal* court, however, failed to adopt *DeSisto*, and instead pointed to two decisions where exclusion of testimony without a Rule 403 analysis was upheld. *Id.* (citing *Thweatt v. Ontko*, 814 F.2d 1466 (10th Cir. 1987); *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458, 466 (9th Cir. 1987). There is thus law in the Ninth Circuit in the form of the *General Signal* case that

holds that in some circumstances it is acceptable to exclude evidence solely because its admission would cause delay.

This is in direct conflict with *DeSisto*, which held that judges may exclude evidence under Rule 403, but that the rule "requires a balance of probative value against the negative consequences of using a particular piece of evidence. *DeSisto*, 929 F.2d at 795. This is, as the plain language of the case says, a requirement. Trial courts within the First Circuit may not, as those in the Ninth Circuit may, exclude evidence solely to prevent delay and to enforce rigid time limits. Following this requirement to its logical conclusion, harmless error could not be committed in the First Circuit on this issue; either the Rule 403 analysis is performed or it is not. If it is not performed, the case will be reversed.[2]

In contrast, the law in the Ninth Circuit is that if the exclusion did not result in prejudice, then no Rule 403 analysis is required. Of course, without a 403 analysis by the district court, the Ninth Circuit has no basis on which to decide lack of prejudice. The Ninth Circuit's review of General Signal's offers of proof on the issue of General Signal's rebuttal case is a poor substitute for the review of the district judge at the trial level who is aware of the facts in the case and is in a position to evaluate the witnesses, unlike the Ninth Circuit panel.[3]

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[2] MCI argues that the Ninth Circuit found that the district court's error, if any, was harmless. *See* MCI Opp. at 5. In fact, the Ninth Circuit never mentions harmless error in its opinion.

[3] MCI claims that General Signal argued in its petition that the Ninth Circuit did not have offers of proof to review. MCI

C. The *General Signal* opinion also conflicts with cases from the Seventh and Eighth Circuits.

MCI's attempt to distinguish *Hollingsworth* solely based on the facts of the case fails. The Eighth Circuit stated a rule of law that "it is 'an abuse of the trial court's discretion to exclude probative, non-cumulative evidence simply because its introduction will cause delay.'" *Hollingsworth*, 931 F.2d at 1305. This rule implies the necessity of a Rule 403 analysis. MCI utterly fails to address this point in its opposition.

In *Hollingsworth*, the court found that the district court failed to provide any reason for the exclusion of the evidence. *Id.* at 1304. The court held that a district court abuses its discretion when there is no basis in the record, or, preferably, an explanation from the district court regarding the reasons for excluding evidence. *Id.* at 1305. Such an explanation constitutes a Rule 403 analysis is.

Prior to articulating the reasons for the exclusion of evidence, a district judge must first conduct a Rule 403 analysis. *Hollingsworth* essentially requires that analysis by stating that a court may not exclude evidence simply to avoid delay. *Id.* The only standard for determining the admission of evidence is Rule 403.

The manner in which the evidence was excluded in the *General Signal* case is even more egregious that in

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Opp. at 5 n.5. To the contrary, General Signal stated in its petition that the district court did not permit General Signal to submit offers of proof in written or oral form. General Signal Petition at 4. Thus, the Ninth Circuit had nothing from the district court record to review.

Hollingsworth because the district judge in *General Signal* explicitly cited delay as the only reason for the exclusion, whereas the judge in *Hollingsworth* provided no reason. As a matter of law, according to the Eighth Circuit, the district judge in *General Signal* abused his discretion because he excluded evidence solely to prevent delay. *Id.*

MCI ignores the similarities between the *McKnight* case and the *General Signal* case. The same "hourglass method" was employed by the district judges in both cases. Had the defendant preserved the issue for appeal, the Seventh Circuit would have reversed and remanded for a new trial. *McKnight*, 908 F.2d at 115. In this case, the issue was preserved; had this case been argued before the Seventh Circuit, it would have been reversed.

The *McKnight* court's discussion of time limits was not *dicta*, as MCI argues. Indeed, the Seventh Circuit stated a similar rule of law as that stated in *Hollingsworth*: "to impose arbitrary limitations, enforce them inflexibly, and by these means turn a federal trial into a relay race is to sacrifice too much of one good – accuracy of factual determination – to obtain another – minimization of legal expense." *McKnight*, 908 F.2d at 115. In the Seventh Circuit, as in the Eighth Circuit, it is clear that district judges may not exclude evidence solely to prevent delay.

III. CONCLUSION

Trials not permitting offers of proof and, perforce, without Rule 403 analyses do not – cannot – satisfy due process. Because neither the founding fathers nor the First, Seventh or Eighth Circuits contemplated such a Kafkaesque scenario, *certiorari* should be granted.

Respectfully submitted,

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